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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE BALTIMORE METROPOLITAN CHAPTER OF AMERICANS FOR CONSTITUTIONAL ACTION

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INDEX

Table of Contents

	PAGE
Interest of Amicus	1
Statement of Facts	2
Summary of Argument	3
Argument:	
I. No One Has The Right To Employment On His Own Terms	4
II. A State, As An Employer, Has A Right To Require As A Condition Of Employment Acknowledgment Of Loyalty To It By Those Who Seek Employment	6
III. The Maryland Oath Is Reasonable	8
Conclusion	10

Table of Authorities

Cases

Adler v. Board of Education of the City of New York, 342 U.S. 485	5
Garner v. Board of Public Works of Los Angeles, 341 U.S. 716	6, 7
McAuliffe v. Mayor, etc. of the City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892)	4
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	5

Statutes

Md. Code Ann. Art. 85A (1964): Section 1 et seq.	2

Executive Orders

PAGE

President's Loyalty Order of March 22, 1947, Executive Order No. 9835, 12 Federal Register 1935 ... 5, 6, 7, 8

Authorities

Boorstin, Daniel J., "The Americans", Random House (1965) ... 10

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The Baltimore Metropolitan Chapter of Americans For Constitutional Action appears Amicus, with consent of all parties, in support of the position advanced by Appellees.

INTEREST OF AMICUS

Americans For Constitution Action, of which the Baltimore Metropolitan Chapter is a part, is a non-partisan, non-profit nationwide organization. It was founded in 1959 by a group of citizens who believe our constitutional system of government, as it functions both at national and state

levels, provides the solid foundation upon which the structure of our free social order has been erected and that, if we are to preserve this order, its foundation must be protected against erosion or destruction.

The Baltimore Metropolitan Chapter of Americans For Constitutional Action has an interest in the present case in that its membership is composed of residents of the State of Maryland. Our objective is a defensive one, but we are convinced that an effective defense of what we seek to preserve is vital to the general welfare of Maryland and the United States. We view the State of Maryland in this case as an employer and, as such, vested with the right to require acknowledgments of loyalty to it by those persons who freely and voluntarily apply to enter the employ of the State.

STATEMENT OF FACTS

Appellant seeks to have declared unconstitutional the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated Code of Maryland (1964 Ed.), Article 85A, § 1 et seq., exacted of public employees as a condition precedent to public employment.

Appellant brings this action in consequence of appellees' refusal to employ him as a visiting lecturer at the University of Maryland, by reason of his having declined to sign the following certification:

> "I, ... do certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Appellant contends that the requirement of the oath and the denial of employment to him in consequence of his refusal to sign the same, are unconstitutional infringements of his rights.

There is a singular absence from appellant's brief of any discussion of the rights of the State of Maryland as his prospective employer. It is therefore advisable to determine what those rights are before turning to an examination of the appellant's arguments concerning his rights, in order that his arguments may be seen in a more balanced perspective, viewed in relationship to an adequate consideration of the rights of the State as employer.

SUMMARY OF ARGUMENT

Amicus Curiae contends that all persons, including appellant, who instead of being self-employed seek to be employed by others, owe obligations of loyalty to those from whom they seek employment.

The State of Maryland as an employer has a right to require acknowledgments of loyalty to it to be made by those who freely and voluntarily seek to enter its employ.

We contend the State of Maryland and all it sub-divisions and agencies are maintained in existence by payment of taxes, license fees and other such imposts. We contend also that those who pay such taxes or license fees and imposts are the employers of all persons who freely and voluntarily choose to hold elective or appointive offices or other positions of profit or trust in the Government or in the administration of the business of the state or any of its sub-divisions or agencies. And, we contend that all persons who voluntarily hold any such offices or positions of profit or trust are employees of the taxpayers and that they owe obligations of loyalty to the taxpayers; and that

the taxpayers have a right to require acknowledgments of those obligations of loyalty from all their employees.

ARGUMENT

I.

NO ONE HAS THE RIGHT TO EMPLOYMENT BY A STATE ON HIS OWN TERMS.

It is established law that no one has the right to employment by the State on his own terms. The State, like any other employer, may place reasonable requirements upon its employees. The State, again like any other employer, may require its employees to refrain from conduct, the general prohibition of which would be unconstitutional.

McAuliffe v. Mayor etc. of the City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), dealt with a police regulation which stated:

> "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever."

The plaintiff was dismissed for violation of this regulation. His petition for reinstatement was dismissed.

Justice Oliver Wendell Holmes, speaking for the Court, stated:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any *reasonable* condition upon holding offices within its control. This condition seems to us *reasonable*, if that be a question open to revision here." (Emphasis added.)

The Supreme Court of the United States has made similar statements of the law. *United Public Workers of America v. Mitchell*, 330 U.S. 75, upheld the "Hatch Act," which forbade certain specific political activities on the part of federal employees. There the Court stated at page 101:

> "For regulation of employees it is not necessary that the act regulated be anything more than an act *reasonably* deemed by Congress to interfere with the public service." (Emphasis added.)

These cases clearly establish that government, State, Federal, or local may require that its employees refrain from conduct *reasonably* deemed detrimental to the public service, even though such conduct may include activities protected by the constitution.

A fortiori, the State may require that its employees not be subversive or disloyal persons. There is no constitutional right to be "engaged in one way or another in the attempt to overthrow the Government . . . by force or violence." In *Adler v. Board of Education of the City of New York*, 342 U.S. 485, the Court stated:

> "It is . . . clear that [persons] have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75. They may work for the school system upon the *reasonable* terms laid down by the proper authorities of New York. . . . [They] . . . may be denied . . . the privilege of working for the school system of the State of New York because . . . of their advocacy of the overthrow of the government by force or violence . . ." (Emphasis added.)

That it is not merely *reasonable* but *imperative* that the government require that its employees not be disloyal or subversive persons is established by the President's Loyalty

Order of March 22, 1947, Executive Order No. 9835, 12 Federal Register 1935, which stated in part:

> ". . . it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States . . ."

and:

> ". . . maximum protection must be afforded to the United States against infiltration of disloyal persons into the ranks of its employees . . ."

It is clear that under the law it is neither unreasonable nor a violation of any constitutionally protected right for the State to require that its employees not be subversive or disloyal persons.

II.

A STATE, AS AN EMPLOYER, HAS A RIGHT TO REQUIRE AS A CONDITION OF EMPLOYMENT ACKNOWLEDGMENT OF LOYALTY TO IT BY THOSE WHO SEEK EMPLOYMENT.

It is also settled law that a State may take reasonable steps to assure itself that its employees or prospective employees are not subversive or disloyal persons, just as any employer may satisfy himself that his employees meet the reasonable requirements of the employment in question. The Supreme Court of the United States has specifically so held in *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716. Speaking of a Charter amendment providing for the oath and affidavit in question there, the Court stated at page 718:

> "The provisions operating thus prospectively were a *reasonable* regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States, cf. Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was *reasonably* designed to protect the integrity and competence of the service. This Court has held that Congress may reasonably

> restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U.S. 75, 102-103 (1947), and a State is not without power to do as much." (Emphasis added.)

The Court further stated at page 720:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

Justice Frankfurter in a concurring opinion stated at page 724:

> "The Constitution does not guarantee public employment. City, State, and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56."

That a government may take reasonable steps to assure itself that its employees are not subversive or disloyal persons is further confirmed by the President's Loyalty Order, *supra*. Part V of that Order reads in relevant part:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the government of the United States."

Under Part V, there can be included in the determination of disloyalty:

"2c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States."

III.

THE MARYLAND OATH IS REASONABLE

Under the decisions of the Supreme Court of the United States quoted above, the appellant can prevail only if he can show:

(1) that the Maryland oath is constitutionally invalid for reasons e.g., vagueness, that could invalidate *any* oath, statute, or other governmental act; or

(2) that the Maryland oath is unreasonable (bearing in mind the repeated emphasis in the above-quoted cases on reasonability).

In reality, appellant is trying to argue that the Maryland oath is unreasonable. He does not use the word, however; words such as "reasonable" and "unreasonable" being sober, established, *legal* terms.

Rather, appellant attempts to establish the unreasonability of the statute and oath in question by means of non-legal pejorative terms and words of high emotional content.

Appellant's brief, for example, makes such statements as the following:

"Maryland's loyalty oath . . . certainly excludes loyal and fit persons who are highly conscientious and sensitive . . ." (page 54).

"Such oaths and inquiries are relics of the Salem Witch Trials . . . and earlier abominations" (page 58).

"For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland" (page 62).

But when examined in the light of the established law as to the rights of the State as employer, these arguments

can be seen to be without any substance whatever. Take, for example, the use of the word "abominations." Appellant does not contend that it is an "abomination" that the State should wish to keep subversive and disloyal persons out of its employ. He does not contend that oaths *per se* are "abomination." Yet putting the two together, he says that it is an "abomination" for the State to try to protect itself by means of an oath.

Or take his contention that the oath is an "affront." It is not claimed that it is an "affront" that the State wants to exclude disloyal persons from its employ. Appellant does not say that an oath, any oath, is an "affront." Yet somehow he concludes that the two put together are an "affront."

It is a strange kind of reasoning that conjoins a constitutional means with a constitutional end and comes up with an unconstitutional means-to-an-end.

Appellant's arguments, furthermore, consist essentially of broad assertions of fact based on astonishingly negligible evidence. He says, "For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland." Yet he points to only *two* persons (in eighteen years) who have been affronted, himself and a certain "distinguished Johns Hopkins University Scientist [sic]" referred to in connection with the Salem Witch Trials on page 57 of his brief!

According to appellant's reasoning, the hundreds of persons who during those eighteen years have taken the oath willingly and gladly, since they were not affronted, could not have been "loyal, conscientious people!" Only appellant and his "distinguished Johns Hopkins University Scientist" fit that description!

These are frivolous conclusions, to be sure. But such extraordinarily frivolous conclusions can follow only from

premises of like extraordinary frivolity, such as the appellant's in the present case.

CONCLUSION

This court, for the reasons stated above, should affirm the lower Court's action dismissing appellant's Complaint.

It is interesting to note by way of concluding statement that support can be found for the proposition that the Declaration of American Independence was the first American "loyalty oath". This view is neatly stated in the book "The Americans" by Daniel J. Boorstin published in 1965. Dr. Boorstin is professor of American History at the University of Chicago. On pages 378-382 of the above mentioned book he relates the story of the signing of the Declaration of Independence and cites Thomas McKeon, member of the Continental Congress from Pennsylvania, as his authority for holding that, "'the purpose of the Declaration as finally signed was to provide a kind of public loyalty-oath, a pledge of allegiance to the course already taken." Referring to McKeon's account of the signing, Dr. Boorstin says (page 379 of his book) "if this was the case, the Declaration was as much a loyalty-oath as a declaration of principles. And it was, then, one of the first and surely the best known and best reputed (as well as the most misunderstood) of the long line of Americans' efforts to reassure themselves by public oaths of loyalty."

Respectfully submitted,

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* Counsel is indebted to Robert W. Fox, Esquire, of Biglerville, Pennsylvania for his assistance in preparing this Brief.